

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

No. 1:12-cv-00257-JB-LFG

vs.

LARRY A. GOLDSTONE,
CLARENCE G. SIMMONS, III,
and JANE E. STARRETT,

Defendants.

**DEFENDANT JANE STARRETT'S RESPONSE TO
NOTICE OF SUPPLEMENTAL AUTHORITY**

The SEC's "supplemental authority," SEC v. Sells, 2012 U.S. Dist. LEXIS 112450 (N.D. Cal. Aug. 10, 2012), *underscores* that the Complaint fails to state a claim for scheme liability against Ms. Starrett. *First*, the conduct alleged in Sells—unlike the conduct the SEC alleged here and in SEC v. Kelly, 817 F. Supp. 2d 340 (S.D.N.Y. 2011), and SEC v. Lucent Technologies, Inc., 610 F. Supp. 2d 342 (D.N.J. 2009)—was *inherently deceptive* and *distinct from* any alleged misrepresentation or omission. Specifically, to boost reported revenue and in violation of the company's revenue recognition policy, the defendants in Sells allegedly (i) orchestrated *fictitious* product sales, (ii) created *false* forms documenting those sales, and (iii) procured *forged* signatures from customers and sales representatives. Sells, 2012 U.S. Dist. LEXIS 112450, at *5-12. Given this alleged misconduct (which the SEC simply ignores in its Notice), the Sells court held that "the deceptive conduct . . . goes beyond the making of material misstatements or omissions." Id. at *20. The SEC here alleges no inherently deceptive conduct beyond the alleged misrepresentations and omissions.

Second, the SEC in Sells *never* claimed that the defendants were primarily liable as “makers” of misrepresentations, but alleged only that they engaged in a fictitious sales scheme. Id. at *12-14. The Sells court therefore reasoned that Janus did not “foreclose[]” the scheme claim which was based on inherently deceptive *conduct* rather than misstatements. Id. at *18-21. Here, as in Kelly and Lucent, the SEC *has* alleged from the outset that Ms. Starrett made misrepresentations and omissions to the investing public (*e.g.* Compl. ¶¶ 4, 7, 75, 87, 90), but now attempts to recast its Complaint to claim scheme liability after conceding that Ms. Starrett was not the “maker” of any alleged misstatement as required by Janus. (Doc. 49 at 26). Both Kelly and Lucent rejected the SEC’s identical maneuver of “labeling the alleged misconduct a ‘scheme’ rather than a ‘misstatement’” because it would open a “back door into [primary] liability.” Kelly, 817 F. Supp. 2d at 343; Lucent, 610 F. Supp. 2d at 359-61. Sells is not to the contrary.

Dated: September 11, 2012

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 11, 2012, Defendant Jane Starrett's Response to Notice of Supplemental Authority was electronically filed with the Clerk of Court using the CM/ECF system that will send notification of such filing to all counsel of record.

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